08-1206

IN THE
Supreme Court of the United States

BRYAN ANDREWS and SUSAN ANDREWS,
Petitioners,

v.

CHEVY CHASE BANK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. THE SEVENTH CIRCUIT'S DIRECT CONFLICT WITH *YAMASAKI* IS MANIFEST.

This Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), dictates that class actions are possible, as governed by Rule 23, for claims brought under any statute absent a "clear expression of congressional intent" to the contrary. *Id.* at 700. As extensively discussed in the Andrews' Petition, nothing in the Truth in Lending Act ("TILA") provides a "clear expression" prohibiting class actions on behalf of homeowners seeking to avail themselves of TILA's rescission remedy. Pet. 11-34. Consequently, the Seventh Circuit's holding "*as a matter of law* that a class action for the rescission remedy under TILA may not be maintained" directly conflicts with *Yamasaki* and calls for this Court to grant a writ of certiorari. Pet. App. 17a (emphasis added).

Chevy Chase's Brief in Opposition does not even attempt to find anything in TILA that meets *Yamasaki*'s "clear expression" requirement. In fact, Chevy Chase candidly admits that the text of TILA's rescission provision "does not cap a rescinding borrower's recovery and does not reference class actions." Br. Opp. 3. Those responses reiterate the Seventh Circuit's manifest conflict with *Yamasaki*.

Moreover, Chevy Chase's arguments that *Yamasaki* does not apply to this case are unavailing. First, its attempt to distinguish TILA from the

"jurisdictional" Social Security statute examined in *Yamasaki* is both inaccurate and irrelevant. *See* Br. Opp. 7-8. As the Andrews' Petition discussed, nothing in *Yamasaki* even suggests that the Court limited its holding to a certain subset of statutes. *See* Pet. 6-17 & n.3; *see also In re the Charter Co.*, 876 F.2d 866, 872 (11th Cir. 1989) (applying the "*Yamasaki* presumption" to hold that bankruptcy statutes allow class proofs of claim and class actions as part of bankruptcy proceedings). Instead, the Court set out a categorical rule: "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court" . . . . *Yamasaki*, 442 U.S. at 700 (quoting Fed. R. Civ. P. 1).

Nothing in the "*all* suits of a civil nature" language of Federal Rule of Civil Procedure 1, upon which the Court based its holding, limits its scope to certain types of statutes. Fed. R. Civ. P. 1 (emphasis added). To the extent *Yamasaki* notes the jurisdictional nature of the Social Security statute at issue, it is to explain that jurisdictional statutes are *not an exception* to the general rule, rather than to suggest the general rule's narrow scope. *See* 442 U.S. at 700-01 (explaining that the jurisdictional nature of the statute at issue "does not indicate that the *usual Rule* providing for class actions is not controlling" (emphasis added)). Chevy Chase's argument that *Yamasaki* is limited to jurisdictional statutes is also fatally flawed in that TILA's rescission provision is a jurisdictional statute. *See* Pet. 17.

Second, Chevy Chase cannot avoid *Yamasaki*'s mandate by observing that class treatment is available for TILA actions that do not seek rescission.[1] *See* Br. Opp. 8-9. Again, nothing in the categorical language of *Yamasaki*, or the language of Rule 1 upon which it relies, limits its scope to certain types of remedies. The rescission statute's "[a]dditional relief" provision makes it crystal clear that whether damages are available under 15 U.S.C. § 1640 does not affect the rescission remedy. *See* 15 U.S.C. § 1635(g) ("In *any action* in which it is determined that a creditor has violated this section, *in addition to rescission* the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind." (emphases added)).

Rescission is an integral part of TILA that protects the homeownership of refinancing borrowers who do not receive required disclosures. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). *Yamasaki* dictates that homeowners have the possibility of seeking rescission as a class because there is no Congressional expression banning such actions.

II. NO ALTERNATE REASONS COUNSEL AGAINST GRANTING CERTIORARI.

Unable to overcome the direct conflict with *Yamasaki*, Chevy Chase posits two alternate reasons

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[1] This possibility is not true for the case at hand, because the district court held statutory damages were not available. *See* Pet. App. 39a.

why certiorari should not be granted: (1) that the absence of a cap on class rescission relief somehow demonstrates Congressional intent to deny class rescission altogether; and (2) that the Seventh Circuit's dicta about Rule 23 should doom the grant of certiorari. Both of these arguments fail.

First, Chevy Chase argues that Congress could not have intended TILA class actions seeking rescission even when the text of TILA does not limit these actions. *See* Br. Opp. 9-12. To the extent this construction of § 1635 draws on the Seventh Circuit's opinion and *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007), the Andrews' Petition detailed its fatal flaws. *See* Pet. 19-34. Moreover, Chevy Chase's argument both violates this Court's principles of statutory construction and ignores the plentiful evidence that Congress did *not* intend such a ban.

Chevy Chase claims that the Congressional intent in 15 U.S.C. § 1640(a)(2)(B), which restricts class statutory damages, prohibits class actions seeking rescission under 15 U.S.C. § 1635 even though that restriction *does not apply* to class actions seeking rescission. But, under this Court's precedents, construing § 1635 must "begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). The "task is to construe what Congress has enacted." *Id.*

The text of §1635 creates both a right and a remedy—rescission—for homeowners who receive inaccurate disclosures of material loan terms. The statute expresses no limitation on the form of action,

as Chevy Chase concedes, nor is there any text in § 1635 suggesting that the right cannot be exercised either in an individual, consolidated, or class proceeding. Accordingly, Chevy Chase's interpretation that the statute prohibits rescission class actions fails when the analysis focuses, as it must, on the "language of the statute."

Chevy Chase, instead, seeks to constrain § 1635's rescission right by claiming—contrary to logic—that the *absence* of a cap on class rescission claims proves class actions are never available. Although Congress never said it, Chevy Chase claims Congress could not possibly have intended to allow uncapped class rescission relief when it capped class statutory damages. *See* Br. Opp. 9. In reading class rescission out of the statute, Chevy Chase ignores the "familiar principle of statutory construction . . . that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Chevy Chase, like the Seventh Circuit, turns this principle on its head by arguing Congress's silence demonstrates its intent to prohibit class rescission, rather than drawing the negative inference—namely that Congress intended *not* to cap class rescission liability. For the reasons already explained by the Andrews, it is perfectly rational that Congress would have limited class statutory damages but retained class rescission. *See* Pet. 26-27.

This backwards argument about Congressional intent also ignores the plentiful

evidence already cited by the Andrews that Congress was aware of suits seeking class rescissions when amending TILA in 1995. *See* Pet. 28-34. Chevy Chase's contention, Br. Opp. 11, that legislators involved in the 1995 amendments were unaware of class rescission actions is simply wrong. *See* 141 Cong. Rec. H4120 (daily ed. Apr. 4, 1995) (statement of Rep. Roukema) ("[N]early 50 class action lawsuits have been filed and in virtually all of the cases, the remedy sought is rescission."); *id.* at S5614 (daily ed. Apr. 24, 1995) (statement of Sen. D'Amato) ("If a class-action rescission is granted, every class member would be released from their mortgage lien, and the obligation to pay finance charges and other charges."). With full knowledge of these suits, Congress acted deliberately: it provided retroactive "forgiveness" and prospective relief for certain violations that formed the basis for the class actions, but did not insert a ban on class rescission into TILA. If Congressional intent were relevant here, this action is a clear expression of Congress's support for rescission class actions. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) ("Its silence on the issue, coupled with its certain awareness of the prevalence of [relevant] litigation, is powerful evidence that Congress did not intend" to eliminate class rescission in the 1995 amendments).

Chevy Chase's continued reliance on the legislative intent divined by the Seventh Circuit's opinion impermissibly "elevat[es] . . . judge-supposed legislative intent over clear statutory text." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting). In fact, the

argument follows the precise pattern rejected by Justice Scalia's dissent in *Zuni*:

> The very structure of the [argument] provides an obvious clue as to what is afoot. The [argument] purports to place a premium on the plain text of the . . . statute, but it first takes us instead on a roundabout tour of [c]onsiderations *other* than language—page after page of unenacted congressional intent and judicially perceived statutory purpose. Only after we are shown why . . . concentrate[ing] its argument upon language alone (impliedly a shameful practice, or at least indication of a feeble case), are we informed how the statute's plain text does not unambiguously *preclude* the interpretation [it] thinks best. This is a most suspicious order of proceeding, since our case law is full of statements such as "We begin, as always, with the language of the statute" . . . .

Id. at 108-09 (citations and internal quotation marks omitted).

As its second ground for ignoring the conflict with *Yamasaki*, Chevy Chase posits that Federal Rule of Civil Procedure 23 forbids class certification in this case. The argument both misconstrues the Seventh Circuit's opinion and falters under this Court's case law interpreting Rule 23.

Chevy Chase's assertion that this Court's favorable ruling for the Andrews would not affect the Seventh Circuit's judgment is simply wrong. *See* Br. Opp. 1, 17. As the court of appeals made clear from the outset, it ruled on one issue and one issue alone: "May a class action be certified for claims seeking the remedy of rescission under the Truth in Lending Act ('TILA'), 15 U.S.C. § 1635?" Pet. App. 2a; *see also id.* ("[W]e are called upon to answer one question. . . ."). Chevy Chase's assertion that "[t]he court below also ruled that . . . petitioners had not satisfied the threshold requirements for a class action under Rule 23(b)" does not make it so. Br. Opp. 1. The court of appeals' singular ruling did not evaluate whether the district court abused its discretion in determining that the class met the requirements of Rule 23. *See* Pet. App. 6a (applying a de novo review standard because the case involved the district court's "'purely legal' determination"). As a result, this Court's ruling that TILA allows class actions seeking the right to rescind would vacate the circuit court's decertification.[2]

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[2] The court of appeals' dicta expressing "serious questions as to whether a TILA rescission class could ever be properly certified under Federal Rule of Civil Procedure 23(b)" was not a ruling that certification in this case did not comply with Rule 23. Pet. App. 14a. Moreover, the court's expressed concerns are easily put to rest. *See* Pet. 18 n.4. A declaration that every homeowner who qualifies for class membership has a right to rescind would not simply "*initiate* a process of individual rescission actions." Pet App. 15a. It would "serve[] as a basis for later injunctive relief" restraining Chevy Chase from refusing to accept the rescission of any class member (if it failed to honor the declaration). Rule 23(b)(2) advisory committee notes (1966). Similarly, supervision of these proceedings by the certifying district court obviates the concern that certification

Instead, this is the very type of case that Rule 23 was created to address:

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." For in such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."

Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982) (citation omitted) (quoting *Yamasaki*, 442 U.S. at 701). Providing thousands of homeowners identical, computer-generated forms describing the terms of their loans created facts "common to the class as a whole." Moreover, the district court resolved "questions of law applicable in the same manner to each member of the class" when it ruled that the identical, inaccurate disclosures violated TILA and gave homeowners a right to rescind their loans.

Chevy Chase tries to minimize this uniformity by forecasting disputes not based upon anything in the record. *See* Br. Opp. 12-16. These hypotheticals are no greater than or different from the managerial

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would result in "hundreds or thousands of individual proceedings" and accordingly fail Rule 23(b)(3). Pet. App. 16a.

difficulties that arise in any viable class action,[3] and the district court already found *this case* meets the elements of Rule 23. Pet. App. 42a-48a.

The suggestion that certification would result in thousands of rescission lawsuits is also meritless. *See* Br. Opp. 4, 15. Any disputes over homeowners' decisions to avail themselves of the rescission remedy would be handled by the certifying district court. That court would maintain control over the class to assure compliance with its ruling by all parties, and it would manage the rescission process for all class members, assuring smooth and orderly administration of the class. Using its power under 15 U.S.C. § 1635(b) to alter the rescission "proceedings prescribed by this subsection," the district court could establish a timeline within which class members would exercise their right to rescind and refinance their mortgages, along with procedures for resolving disputes about class membership and repayment calculations. Instead, it is Chevy Chase's push for decertification that creates the specter of thousands of individual lawsuits across the country seeking rescission based on identical conduct by Chevy Chase, which creates an enormous waste of judicial resources. *See* Br. Opp. 15 (suggesting individual rescission actions all over the country).

Finally, Chevy Chase argues that courts should ban rescission class actions because they

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[3] Moreover, the hypothetical disputes highlight easily resolvable questions of eligibility for class membership that do not undermine class certification. *See* Br. Opp. 13-14.

involve a "personal remedy." Br. Opp. 15. But the issue of whether the loan is rescindable is entirely impersonal. Although the district court allows for an individual decision to rescind by each consumer in the class, *see* Pet. App. 44a-45a, TILA's mechanical rescission process belies Chevy Chase's characterization of rescission as a remedy too personal for class treatment, *see* 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d).[4]

Class actions with the kind of limited "personal" component created by allowing homeowners to choose to rescind are no different from the individual reviews that this Court permitted in *Yamasaki*. *See* Pet. 15-16. The claim that "case-by-case tailoring cannot be reconciled with class-wide rescission," ignores the near identity of the remedy afforded the *Yamasaki* class—a declaration of class-wide entitlement to "inherently individualized" hearings—and the class-wide declaration of the right to an "inherently individualized TILA rescission remedy" sought by the Andrews. Br. Opp. 8, 12.

Likewise, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), this Court allowed a class action by university applicants to seek injunctive relief to remedy racial quotas used in university admissions, even though the ultimate injunctive remedy—changing the racial preference system—would still

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[4] Individual questions about the "impracticab[ility] or "inequi[ty]" of tendering "property," *see* Br. Opp. 2, 12, are not at issue here because only money was exchanged and would be tendered back, rather than "property in kind," 15 U.S.C. § 1635(b).

leave open individual questions of whether each applicant would be admitted into the university and the compensation each class member would receive. *See id.* at 253 (noting the district court split the case into a liability phase and a damages phase). This Court found class action treatment was appropriate because the university was using a uniform admissions procedure document, which the Court found was a "singular policy" used to discriminate on the basis of race. *See id.* at 263-68. In light of Chevy Chase's comparable uniform treatment of refinancing homeowners, class certification would be proper if this Court reversed the Seventh Circuit's determination.

Accordingly, neither of the alternate grounds posited by Chevy Chase—supposed legislative intent or the requirements of Rule 23—justify this Court not granting certiorari to correct the Seventh Circuit's direct conflict with *Yamasaki*.

CONCLUSION

Chevy Chase baldly claims that the mere "threat of such liability from just one rescission class action would *inevitably* make credit more costly and difficult to obtain." Br. Opp. 11-12 (emphasis added). Yet, allowing the Andrews rescission class might as easily have the opposite, salutary effect of rooting out abusive practices, restraining the sale of toxic loan products where the borrower is being buffaloed, and thereby *reducing* the cost of credit. Congress resolved this debate by choosing to impose rescission liability on non-compliant lenders, rather than stick the costs to individual homeowners.

The Seventh Circuit cannot ignore the clear holding of *Yamasaki* to subvert Congress's resolution of this question. This Court should grant certiorari.

Respectfully submitted,

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